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Supreme Court, U.S.
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OCT 23 1984
ALEXANDER L. STEVAS
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84-438

No._____

IN THE SUPREME COURT OF THE
UNITED STATES

S

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
WALPOLE,
Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Jamie Ann Sabino
Klibaner & Sabino
402 Washington Street
Wellesley, MA 02181
(617) 237-7602

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Respondents

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondents Gerald Hill and Joseph Crawford move the Court for an order permitting them to proceed in this Court, in forma pauperis, with their Opposition to the Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court of filed with this Court on September 17, 1984, pursuant to Rule 46 of the Rules of this Court. In support thereof the Respondents state that they are incarcerated within the custody of the Department of Correction and attach affidavits of indigency.

The Respondents further state that the Superior Court of Massachusetts allowed the Respondents to file the original complaints in this matter without fee based on their indigency. Respondents further state based on their indigency that counsel on appeal was appointed for Respondent Joseph Crawford and said appointed counsel's brief was accepted on behalf of Respondent Gerald Hill.

By their attorney,

Janie Ann Sabino
Klibaner and Sabino
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Wellesley, MA 02181
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v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

Affidavit in Support of Motion to
Proceed on Appeal In Forma Pauperis

I, _____, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed in Forma Pauperis and without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? no

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary which you received. Never employed

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source? no

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

   no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no one

I understand that a false statement or answer to any question in this affidavit will subject me to penalities for perjury.

Joseph Crawford

Subscribed and sworn to before me this 19 day of October, 1984

Jamie Ann Sabino
Notary Public
My commission expires:

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

SUPERINTENDENT, MASSACHUSETTS
CORRECTIONAL INSTITUTION,
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Petitioner

v.

GERALD HILL AND JOSEPH CRAWFORD,
Respondents

Affidavit in Support of Motion to
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I, Joseph Crawford, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed in Forma Pauperis and without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of prosecuting the appeal are true.

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   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary which you received. @ 1977 salary unknown

2. Have you received within the past twelve months any income from business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source? no

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, auto-mobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. no

I understand that a false statement or answer to any question in this affidavit will subject me to penalities for perjury.

Gerald Mill

Subscribed and sworn to before me this 5 day of October, 1984

Jamie Ann Sabino
Notary Public
My commission expires:

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BRIEF IN OPPOSITION TO
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TABLE OF CONTENTS

Table of Authorities.....ii

Summary of Argument.....1

Argument

A. The decision by the Massachusetts Supreme Judicial Court is in accordance with the vast weight of opinion and there is little conflict between the federal and state courts.....2

B. This is not an appropriate case in which to grant certiorari on the question of the standard of judicial review as the Massachusetts Supreme Judicial Court did not rule on this question.....6

C. The decision of the Massachusetts Supreme Judicial Court does not conflict with the applicable decisions of this Court.....8

Conclusion.....12

TABLE OF AUTHORITIES

Aikens v. Lash,
514 F.2d 55 (7th Cir. 1975) vacated and remanded
on other grounds, 425 U.S. 947 (1976), reinstated
as modified, 547 F.2d 372 (1976).....2,5,9

Blaney v. Commissioner of Corrections,
374 Mass. 337 (1978).....11

Burns v. Wilson,
346 U.S. 137 (1953).....10

Calloway v. Fauver,
544 F.Supp. 584 (D.N.J. 1982).....3,6

Chavis v. Rowe,
643 F.2d 1281 (7th Cir. 1981).....2,5,6,7

Edwards v. White,
501 F.Supp. 8 (M.D. Pa. 1979) aff'd, 633 F.2d 209,
and 633 F.2d 212 (3rd Cir. 1980).....3

Finney v. Mabry,
455 F.Supp. 756 (E.D.Ark. 1978).....3,6,7,8

Franklin v. Israel,
537 F.Supp. 1112 (W.D. Wis. 1982).....3,6

Green v. Fennel,
500 F.Supp. 870 (S.D. Miss. 1980).....3

Hewitt v. Dept. of Public Safety and Corrections,
38 Md. App. 710 (1978).....3

Hiatt v. Brown,
339 U.S. 103 (1950).....10

Hill v. Superintendent,
392 Mass. 198, 466 N.E.2d 818 (1984).....2,6

Inglese v. Warden, U.S. Penitentiary,
687 F.2d 362 (11th Cir. 1982).....3,6

Kritsky v. McGinnis,
313 F.Supp. 1247, (N.D.N.Y. 1979), aff'd,
456 F.2d 79 (2nd Cir. 1972), rev'd on other grounds,
411 U.S. 475 (1975).....3

Kyle v. Hanberry,
677 F.2d 1386 (11th Cir. 1982).....10

Nolan v. Scafati,
306 F.Supp. 1 (D.Mass. 1969), vacated on other
grounds, 430 F.2d 548 (1st Cir. 1970).....3,6

Ortwein v. Schwab,
410 U.S. 656 (1973).....10

Pollard v. Baskerville,
481 F.Supp. 1157 (E.D. Va. 1979), aff'd without decision, 620 F.2d 294 (4th Cir. 1979).....4

Riner v. Raines,
409 N.E.2d 575 (Ind. 1980).....5

Robson v. Beister,
53 Pa. Commw. 587, 420 A.2d 9 (1980).....5

Ruiz v. Estelle,
530 F.Supp. 1265 (D. Tex. 1980).....11

Russell v. Division of Corrections, Com. of Virginia,
392 F.Supp. 476 (W.D. Va) aff'd without decision
530 F.2d 969 (4th Cir. 1975).....4

Rutherford v. Pitchess,
457 F.Supp. 104 (D.Cal. 1978).....11

Sagerser v. Oregon State Penn., Corrections Division,
41 Or. App. 353 (1979).....3

Smith v. Rabalais,
659 F.2d 539 (5th Cir. 1981), cert. denied,
455 U.S. 992 (1982).....2,5,6,7,8

State ex rel. Meeks v. Gagnon,
95 Wis.2d 115 (1980).....3

United States ex rel. Speller v. Lane,
509 F.Supp. 796 (S.D.Ill. 1981).....3

Washington v. State,
405 So.2d 62 (Ala. Crim. Ct. App. 1981).....3,6

Whelchel v. McDonald,
340 U.S. 122 (1950).....10

Willis v. Ciccone,
506 F.2d 1011 (8th Cir. 1974).....2

Wilwording v. Swenson,
502 F.2d 844 (8th Cir. 1974), cert. denied,
420 U.S. 412 (1975).....2,5,6,8

Wolff v. McDonnell,
418 U.S. 539 (1974).....passim

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GERALD HILL AND JOSEPH CRAWFORD,
Respondents

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

A. The decision below by the Massachusetts Supreme Judicial Court is in accordance with the vast weight of opinion allowing judicial review of prison disciplinary matters in a limited proceeding looking only to the sufficiency of evidence supporting the prison disciplinary board's decision. There is only minimal conflict among state and federal courts on this issue. This conflict does not rise to a level justifying this Court's granting certiorari under Rule 17 of the United States Supreme Court rules.

B. Although there is some conflict on the required standard of review in judicial reviews of disciplinary actions, the Massachusetts Supreme Judicial Court specifically did not decide what test was more appropriate as the Court decided that the disciplinary board's finding did not even meet the more lenient test. As the

Massachusetts Supreme Judicial Court did not reach this issue this case is not an appropriate one in which to grant certorari to resolve what conflict does exist on the proper standard of review.

C. The decision of the Massachusetts Supreme Court does not conflict with applicable decisions of this Court.

ARGUMENT

A. The decision by the Masachusetts Supreme Judicial Court is in accordance with the vast weight of opinion and there is little conflict between federal and state courts.

In Hill v. Superintendent, 392 Mass. 198 (1984), the Massachusetts Supreme Judicial Court held that a person held in a correctional facility has a due process right to review of disciplinary proceedings for sufficiency of the evidence. This question has been presented to a number of federal and some state courts. The overwhelming weight of opinion holds that there is a substantive due process right to review for sufficiency of the evidence. This holding has been advanced by the Fifth, Seventh, Eighth and Eleventh circuits as well as district courts in New Jersey, Wisconsin, Mississippi, Arkansas, Illinois, New York and Pennsylvania and state courts in Alabama, Maryland, Wisconson and Oregon. Smith v. Rabelais, 659 F.2d 539, 545 (5th Cir. 1981), cert. denied, 455 U.S. 992 (1982); Chavis v. Rowe, 643 F.2d. 1218, 1287 (7th Cir. 1981) cert. denied, 454 U.S. 907 (1981); Aikens v. Lash, 514 F.2d. 55, 60 (7th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 947 (1976), reinstated as modified, 547 F.2d 372 (7th Cir. 1976); Willis v. Ciccone, 506 F.2d. 1011, 1018, 1019, n. 11 (8th Cir. 1974); Wilwording v. Swenson, 502 F.2d. 844,

51 (8th Cir. 1974), cert. denied, 420 U.S. 412 (1975); Inglese v. Warden, 687 F.2d. 362, 363 (11th Cir. 1982); Calloway v. Fauver, 544 F.Supp. 584, 605 (D. N.J. 1982); Franklin v. Israel, 537 F.Supp. 1112, 1117 n. 3 (W.D. Wis. 1982); Green v. Fennell, 500 F.Supp. 870 (S.D. Miss. 1980); Finney v. Mabry, 455 F.Supp. 756, 770 (E.D. Ark. 1978); United States ex rel. Speller v. Lane, 509 F.Supp. 796, 800 (S.D. Ill. 1981); Edwards v. White, 501 F.Supp. 8, 11 (M.D. Pa. 1979), aff'd, 633 F.2d 209 and 633 F.2d 212 (3rd Cir. 1980); Kritsky v. McGinnis 313 F.Supp. 1247, 1250 (N.D.N.Y. 1970), aff'd sub nom., Rodriguez v. McGinnis, 456 F.2d. 79 (2nd Cir. 1972), rev'd on other grounds sub nom., Preiser v. Rodriguez, 411 U.S. 475 (1973); Washington v. State, 405 So.2d 62, 64 (Ala. Crim. Ct. App. 1981); Hewitt v. Dept. of Public Safety and Correctional Services, 38 Md. App. 710 (1978); State ex rel. Meeks v. Gagnon, 95 Wis.2d 115 (1980); Sagerser v. Oregon State Penn. Corrections Division, 41 Or. App. 353 (1979). The First Circuit has also touched upon this issue in Nolan v. Scafati, 306 F.Supp. 1, 3 (D. Mass. 1969), vacated on other grounds, 430 F.2d 548 (1st Cir. 1970). While Nolan did not involve a challenge to the sufficiency of the evidence at a disciplinary hearing, it assumed without deciding that the due process clause requires that disciplinary determinations be based on substantial evidence. It is clear that Judge Wyzanski felt there was enough support for this holding to make that assumption reasonable. It was his exact assumption, in fact, that was adopted as law in Kritsky v. McGinnis, supra at 1250.

The Petitioner points to two federal district court

cases affirmed without opinion by the Fourth Circuit and two state court cases as a basis for the statement that there is conflict among the federal and state courts. In looking at the Fourth Circuit affirmations, however, this conflict is not clear. Pollard v. Baskerville, 481 F.Supp. 1157, 1158 (E.D. Va. 1979), aff'd without opinion 620 F.2d 294 (4th Cir. 1980) is not actually on point. It addresses the issue of challenging the veracity of the facts relied on by the disciplinary board or committee and not the sufficiency of the facts found to uphold the decision. It is one thing to say that a court cannot review whether or not a person threatened a guard or other factual findings which would involve reviewing the witnesses' testimony and credibility, but quite a different thing to say that the court cannot accept the facts found but review their sufficiency to uphold a guilty finding.

In Russell v. Division of Corrections, Com. of Virginia, 392 F.Supp. 476, 477 (W.D. Va.), aff'd without opinion 530 F.2d 969 (4th Cir. 1975), the federal district court did rule that the sufficiency of the evidence, as well as the competency of the evidence and credibility of the witnesses were matters beyond its inquiry. This opinion (which came down prior to the holdings by the Fifth, Seventh and Eleventh Circuits and most of the other federal district courts), also addressed several other issues including denial of counsel and other procedural matters. It would be hard to state that an affirmance without an opinion is a definitive statement of the Fourth Circuit's position on the issue. It is conceivable that the Fourth Circuit chose not to address the issue of sufficiency of evidence because

based on the record it was clear that there was sufficient evidence, thus making a ruling unnecessary. In the absence of an opinion we cannot know. It is also important to note that the punishment in this case was confinement to a cell and not the loss of good time credits. With a liberty interest at stake the opinion of the Fourth Circuit might have been different than that of the district court.

An examination of the two state court cases indicates that a true conflict only exists with one case. Robson v. Biester, 53 Pa. Commw. 587, 420 A.2d 9, 12 (1980) is not a decision of the state court of last resort in Pennsylvania and the Pennsylvania Supreme Court has not ruled on this issue.

Therefore, the only true conflict that exists is between Riner v. Raines, 409 N.E.2d 575 (Ind. 1980) and the Fifth, Seventh, Eighth, and Eleventh circuits and the numerous federal district court and state cases cited above. Rule 17 states that a review on writ of certiorari is not a matter of right but of judicial discretion. It further states that it should be granted only when there are special and important reasons therefor. It should be noted that this Court has declined to grant certiorari in several of the circuit court cases that have addressed the issue at question. Smith v. Rabalais, supra; Chavis v. Rowe, supra; Wilwording v. Swenson, supra. This Court also did not address the issue when it granted certiorari in Aikens v. Lash, supra but instead vacated and remanded on other grounds.

In light of these strictures and the existence of only a minimal conflict among the many courts that have examined the

issue of judicial review of prison disciplinary board findings of guilt, this is clearly a case in which this Court should not grant certiorari.

B. This is not an appropriate case in which to grant certiorari on the question of the standard of judical review as the Massachusetts Supreme Judicial Court did not rule on this question.

As noted by the Petitioner, there is some difference among the courts mandating judicial review as to the standard of review. Some courts, notably Chavis v. Rowe, supra; Franklin v. Israel, supra; Calloway v. Fauver, supra; Nolan v. Scafati, supra; Washington v. State, supra, state that the guilty determination must be reviewed for substantial evidence. Other courts, notably Smith v. Rabalais, supra; Inglese v. Warden, supra; Finney v. Mabry, supra, indicate that the court should consider whether the decision is supported by some facts or any evidence at all. In the instant case, however, the Massachusetts Supreme Judicial Court chose not to rule upon whether the "substantial evidence" or the more lenient "same evidence" rule was the more appropriate. The Supreme Judicial Court concluded that the Board's findings failed to meet even the more lenient "some evidence" test. Hill v. Superintendent, 392 Mass. 198, 203, ftn. 5, 466 N.E.2d 818, 822, ftn. 5. As the issue of the standard of review is not decided in this case it would be an inappropriate vehicle for this Court to use to resolve conflicts among other courts.

The Petitioner also misreads the opinions in Smith v. Rabalais, supra, Inglese v. Warden, supra, and Wilwording v. Swenson, supra in postulating that the

Supreme Judicial court has come up with a different standard than either the "substantial evidence" of Chavis v. Rowe, supra or the "some evidence" of Smith v. Rabalais, supra. The Petitioner argues that by stating that it was reviewing the "legal sufficiency" of the evidence to support the disciplinary board's findings, the Supreme Judicial Court went beyond the standard of "any" evidence to support the board's findings. (Petition for Certiorari, p. 20-21). The Petitioner also states that there clearly was some evidence. (Petition for Certiorari, p. 20-21.) The Petitioner seems to be arguing that the "any evidence" standard means any evidence that might be relevant no matter how tenuous. Under such an interpretation of the "any evidence" standard, an inmate who was present in an institution on the day of a fight might be convicted even if the only evidence presented was his presence in the institution on the day in question. His presence at the institution on the day of the fight is certainly a relevant factor, but is far distant from evidence of guilt. Another example might be an inmate convicted of helping another to violate a regulation based only on the evidence that they knew each other. Again, the fact that they knew each other is relevant but only tenuously related to guilt. An "any evidence" standard would be a charade unless there were some test of the legal sufficiency of that evidence linking it to guilt. A reading of the cases that support the "any evidence" standard shows that the legal sufficiency of the evidence must be considered. In Finney v. Mabry, supra the Court specifically states that at some point what is labeled "evidence" cannot serve as a basis for fair fact finding.

Finney, at 770. The Court also refers to "proper evidence." Finney, Id.. Wilwording v. Swenson, supra indicates it would be "a violation of due process to convict and punish a man without evidence of his guilt." Wilwording, supra, at 851 (emphasis added). These cases are indications that the "any evidence" standard of Smith v. Rabalais is the standard used by the Massachusetts Supreme Judicial Court.

C. The decision of the Massachusetts Supreme Judicial Court does not conflict with the applicable decisions of this Court.

In Wolff v. McDonnell, 418 U.S. 539 (1974) this Court did not limit the right to substantive judicial review but actually provided requisites so that such review may be conducted. Although Wolff sets forth a comprehensive list of the procedural requisites that must be provided in prison disciplinary hearings, it does not review, discuss, mention or in any way refer to a limitation of the substantive due process right not to be found guilty except by the appropriate quantum of evidence. Wolff was brought to inquire into and redress faults in the procedural aspects of the Nebraska disciplinary hearings. It can not be said that because the Court did not go beyond the case and make rulings on the availability of a substantive review in any individual case, an issue not presented, that it meant to limit and deny that right. A careful reading of Wolff, in fact, indicates that the procedural requirements are designed to make it possible to have such a review. Specifically, "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for

the disciplinary action." Wolff, supra at 564. The Court stated that this was true even though the Nebraska system did not have a process of administrative appeals. The proceedings, the Court noted, might be used in other instances or collateral determinations by other public boards "and perhaps even the courts, where fundamental consitutional rights may have been abridged." Wolff, supra at 565. The Petitioner cites this portion of Wolff and goes on to state that Crawford and Hill recieved all the process due them and therefore suffered no abridgement of their consitutional rights. This statement both begs the question (which is whether being convicted with no or an insufficent amount of evidence is a violation of a fundamental consitutional right) and miscontrues what the Court requires to be reported in such a written statement. The Court does not state that there must be a written report by the factfinders as to the procedures followed at the hearing. The Court does not state that there must be a written report as to when and how the inmate received notice of the hearing or the factors that show the hearing was an impartial one. The requirement is that the written statement must show the evidence relied upon and the reasons for the action. Therefore, a review would be directed to that evidence and those reasons. As stated in Aikens v. Lash, supra at 60:

> As a practical matter, we fail to see the conflict defendants note between the term "substantial evidence" and the phrase "evidence relied on and reasons for the disciplinary action." Presumably, the Supreme Court did not contemplate in Wolff, where its use of the latter phrase in connection with the array of procedural rights provided was directed at protecting prisoners from subsequent collateral consequences, that these rights should be easily emasculated by allowing prison officials to infringe arbitrarily on an inmate's substantive due process right not to be found guilty except by the appropriate quantum of evidence. See e.g., Gomes v. Travisono, 510 F.2d 537,

49 (1st Cir. 1974); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974).

Preventing arbitrary determinations is the main thrust of Wolff and to do so sometimes the courts must create additional requirements. Wolff intends a genuine hearing and not a charade. Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1982). If a board can find people guilty without some evidence, disciplinary hearings are that charade.

The Petitioner also relies on previous decisions of this Court that have stated that there is no general due process right to judicial review of administrative proceedings. In particular, the Petitioner cites Ortwein v. Schwab 410 U.S. 656 (19 3); Hiatt v. Brown, 339 U.S. 103 (1950) and Whelchel v. McDonald, 340 U.S. 122 (1950). These cases do not have a bearing on the instant matter. Ortwein involved the termination of welfare benefits, which as burdensome as that may be, does not involve a liberty interest. Hiatt and Whelchel involve the review of court-marital hearings. The instant case is not analogous to these military cases as the Framers of the Constitution specifically entrusted to Congress the authority and right to determine the rules for the government and regulation of the military. This Constitutional mandate sets the military apart from the civilian courts. Also, in military cases there is an extensive formal judicial hierarchy set up with a complete appellate system and provisions for ultimate review by a civilian court. Burns v. Wilson, 346 U.S. 137, 141, ftn. 7 (1953).

It must also be noted that, despite Petitioner's claim, the burden on the state is relatively little. The

Petitioner argues that this will cost the Department of Correction a great deal of money as there will have to be more meticulous recording of disciplinary proceedings and a change in those proceedings from informal administrative hearings into more formal, trial type hearings. This argument is without merit since the needed record is no more than what Wolff already requires.

The Petitioner also argues that there would be a cost to the Department and to the courts in increased litigation. Again, this would not be great as it would not require de novo hearings but rather reviews similar to those of other administrative agencies. There is no reason to believe that such hearings would impose a sustantial burden on our state courts. Allowing these limited reviews is a small cost to pay to protect a person's right not to be denied due process and not to arbitrarily lose hard-earned good time credits. It is well settled that constitutional protections cannot be denied for budgetary reasons. Blaney v. Commissioner of Correction, 374 Mass. 337, 372 N.E.2d 770 (1978); Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex. 1980); Rutherford v. Pitchess, 457 F.Supp. 104 (D. Cal. 1978). The Petitioner also presumes to argue that as the budgetary restrictions might affect the day to day life of the inmates it would be better for them not to have such a substantive due process review. This ignores the great desire on the part of inmates not to lose hard-earned good time credits, particulaly for no reason or with no basis in evidence.

Nor would judicial review undercut the legitimate correctional goal of sure and swift discipline for misconduct. As the Petitioner himself points out, the

sanction of isolation would probably be served (and serve its swift disciplinary function) before a matter reached the courts. Injunctions would only be imposed where the inmate has shown a likelihood of success on the merits. Unwarranted punishment is not a legitimate correctional goal. As the forfeiture of good time does not result in swift punishment, judical review could not hinder such a goal in that instance. Also, as the goal of good time credits themselves is to create incentives for obeying rules and good conduct, a halt to arbitrary forfeitures would enhance that goal. It is hard to expect a person to strive for credits that might be taken from him or her arbitrarily. Good conduct is not encouraged when a disciplinary system is a charade.

Nor would such a review place the courts in the position of second guessing the conclusions of adminstrators who have a better grasp of their domain. Again, the Respondent seeks not a review of the validity or credibilty of facts but a review as to whether the facts found constitute substantial evidence for the board's conclusion. This is a function that is reserved in many cases for our courts. It is, in fact, an important task of our courts in criminal matters. It is surely not contended that the F.C.C., the Department of Health and Human Services, the Commissioner of Insurance or any number of agencies or public officials are not expert in their own domains. Yet their actions are reviewed by the courts. Such review is a task that our society allocates to our judges.

CONCLUSION

It is respectfully submitted that for the above reasons the Petitioner has wholly failed to sustain its burden of

establishing under Rule 17 that there are special and important reasons why the writ should be granted. The Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted

Jamie Ann Sabino
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402 Washington Street
Wellesley, Massachusetts 02181
(617) 237-7602